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principal case than this and yet the conclusions reached are logically contrary.

The better opinion seems to be that the term "suit" is a very comprehensive one applying to any proceeding in a Court of Justice by which an individual pursues that remedy which the law affords him.[6] There are numerous instances in the books of proceedings which are technically, and upon good legal reasoning, known as "suits," but which are not necessarily adverse and frequently are not so in fact. It has been held that the application of a poor debtor before a Master in Chancery to be admitted to the poor debtor's oath (a statutory proceeding in Massachusetts in the nature of bankruptcy), is a civil suit.[7] A petition for partition of lands and subsequent proceedings have been held a suit.[8] Condemnation proceedings have repeatedly been held "suits" under various statutes;[9] as have also proceedings to establish a drain,[10] and petitions for the laying out of highways.[11] An application to a probate Court for an assignment of dower to a widow is a "suit" within the statute of limitations of Alabama.[12] Surely such an action is not "adverse." The case of *Haven v. Hilliard*[13] in Massachusetts determined that "a proceeding in the Probate Court, seeking the proof and establishment of a will of lands, is a suit at law." Mandamus,[14] *certiori*,[15] and *habeas corpus*[16] are all suits at law.

J. F. N.

BANKS—IS A BANK A HOLDER IN DUE COURSE OF PAPER DEPOSITED?—What is the relation between a bank and its depositor? Is it one of debtorship, or of agency? These questions are primarily for the jury to determine from the evidence adduced. Either relation may exist; the former is the more frequent. Oftentimes, however, the parties have no express agreement and there is nothing to determine their status other than the circumstances surrounding the deposit. When money is deposited, there is very seldom room for doubt, except in those few isolated cases of an express bailment of a specific sum of money. When the doubt does arise, it is in that class of cases

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6 See Words and Phrases, Vol. 7, Page 6769 and cases there cited, and also 37 Cyc. 523, note 22.

7 In the Matter of William A. Jenckes, 6 R. I. 18 (1859).

8 Callen v. Ellison, 13 Ohio St. 446 (1862).

9 City of Marion v. Granby, 68 Iowa, 142 (1885); Searl v. School District No. 2, 124 U. S. 197 (1887).

10 In re The Jarnecke Ditch, 69 Fed. 161 (1895).

11 Hyde Park v. Wiggin, 157 Mass. 94 (1892); Dunn v. Town of Pownall, 65 Vt. 116 (1893).

12 Farmer v. Ray, 42 Ala. 125 (1868).

13 40 Mass. 10 (1839) at P. 19.

14 In re Sloan, 5 New Mex., 590 (1891); Mayor of Roodhouse v. Briggs, 194 Ill., 435 (1902) at P. 437.

15 Kendrix v. Kellogg, 32 Ga. 435 (1861) at P. 437.

16 Holmes v. Jennison, 39 U. S. 540 (1840).

concerning a deposit of negotiable paper. If time paper is deposited, the ordinary presumption is that it constitutes a bailment for collection, even though the bank permits the depositor to draw against the amount with which he is credited.[1] The real difficulty lies in those cases where there is a deposit of demand or matured paper. In the absence of an express agreement, which is so frequently lacking, the first resort is to the indorsement of the depositor. If the check or draft is indorsed "for collection" or "for collection and credit" the presumption is that the relationship is one of agency for collection and that a debt does not arise until the collection is made.[2] There are many other circumstances which are equally determinative, as for instance, charging interest for collection,[3] charging interest on money loaned before collection,[4] or the entry of bills, drafts or checks as such and not as cash.[5] Any one of these conditions is, of itself, sufficient basis for the presumption that a bailment exists.

On the other hand, it is quite frequently the case that the indorsement is in blank and the amount of the check, draft or bill is entered in the pass-book as cash, with the privilege of drawing against it immediately. In the absence of an express understanding to the contrary, the Courts presume, in a majority of the jurisdictions where this question has been passed upon, that the parties stand in the position of debtor and creditor and that title to the paper passes immediately.[6] Opposition to this presumption, however, is not inconsiderable.[7] The fact that the bank, by real or tacit agreement, can charge back against the account of the depositor if the check or draft is not paid upon presentation, is looked upon as stamping the transaction immediately as a bailment. The right of the depositor to draw against the paper is considered a mere gratuitous loan, signifying nothing. So much

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[1] Giles v. Perkins, 9 East. 12 (1807); Scott v. Ocean Bank, 23 N. Y. 289 (1861).

[2] Commercial Bank v. Armstrong, 39 Fed. Rep. 684 (1889); Ayres v. Farmer's Bank, 79 Mo. 421 (1883); National Bank v. Hubbell, 117 N. Y. 384(1889).

[3] Shipsey v. Bowery National Bank, 59 N. Y. 485 (1875).

[4] Thompson v. Giles, 2 B. & C. 422 (1824).

[5] Thompson v. Giles (*supra*); Bailie v. Augusta Saving Bank, 95 Georgia, 277, 280 (1895).

[6] Metropolitan National Bank v. Loyd, 90 N. Y. 530 (1882); Cragie v. Hadley, 99 N. Y. 131 (1885); Riverside Bank v. Woodhaven etc. Co., 34 N. Y. App. Div. 359 (1898); King v. Bowling Green Trust Co., 129 N. Y. Suppl. 977 (1911); Denton National Bank v. Kemney, 81 Atlantic Rep. 277 (Md., 1911); Downing v. National Exchange Bank, 96 N. E. Rep. 403 (Ind., 1911); Fourth National Bank v. Mayer, 14 S. E. Rep. 891 (Georgia, 1892); Soffert v. National Bank of Republic, 175 Ill. 432 (1898); Hoffman v. First National Bank, 46 N. J. L. 604 (1884); Federal Courts apparently in accord, see Burton v. U. S., 196 U. S. 283, 297 (1904); Bolles, Banks and Their Depositors (1887), p. 59.

[7] Armour Packing Company v. Davis, 118 N. C. 548 (1896); *In re* State Bank, 56 Minn. 119 (1894); Balbach v. Freylinghausen, 15 Fed. Rep. 675 (1883) (probably overruled by Burton v. U. S., *supra*); Louisiana Ice Co. v. National Bank, 1 McGloin, 181 (Ind. 1881); Morse on Banking (1888), Vol. 2, §586, citing several of the above cases which cite as their authority previous works of the same author; Scott v. Ocean Bank (*supra*) is wrongly stated by several of these Courts to be in support of their contention.

emphasis has been placed upon the power of the bank to charge back on the account of the depositor, a power which is said to be inconsistent with a transfer of title, that, when it is lacking, one of these same Courts has held that with the mere deposit title passed to the bank.[8] But inasmuch as the bank could recover, in the absence of negligence on its part, against the depositor on his indorsement, to the amount advanced in the meantime, or could return the check and sue on the original implied contract, the fact that the parties have substituted this simple and more satisfactory expedient should not be sufficient to warrant changing the presumption from that of debtorship to one of agency.[9] It should be remembered that these various presumptions arise from the insufficiency of evidence of real understanding between the parties, and that they are, no matter how strong, of no consequence if an express contract can be proved.

Perhaps in no other State is the presumption of debtorship, under the above facts, more frequently and unqualifiedly invoked than in New York. As a consequence, it is generally known as the New York rule, although as stated previously, it is by no means limited to that jurisdiction. It is rather remarkable that the case almost invariably cited in support of the rule states it in a dictum.[10] Probably the earliest case on the subject, in speaking generally of the nature of a deposit, whether of money, drafts or checks, treats the matter as a foregone conclusion not even requiring citations.[11]

In a recent case,[12] in the appellate division of the Supreme Court of New York, the rule was applied without any very great hesitation to facts that were rather unusual; the depositor opened his account with the bank with the check in question, and the check was drawn by him to the order of the bank on another banking institution. The trial judge directed a nonsuit in an action by the depositor against the bank for refusing to honor a check to the amount of the check deposited. The defendant had with proper diligence attempted to collect the first check; when the payee refused cash, a certification was accepted; on the next day the payee bank closed its doors. The majority of the Court held that the defendant was a "holder" within the second section of the Negotiable Instruments Law, which states that a certification of a check secured by a holder discharges the maker. There was a dissenting opinion on the grounds that the defendant had, under the circumstances, used all care that could be required of it.

Counsel for the defendant argued that the bank became a mere agent to collect and that when it secured the certification it was not a "holder" within the act. An attempt was made to

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[8] Security Bank v. Northwestern Fuel Co., 58 Minn. 141 (1895).
[9] Bolles, Modern Law of Banking (1907), Vol. 1, p. 210.
[10] Cragie v. Hadley (*supra*).
[11] Commercial Bank v. Hughes, 17 Wend. 194 (1837).
[12] Lyons v. Union etc. Bank, 135 N. Y. Suppl. 119 (1912)

distinguish this from prior cases because of the fact that the plaintiff deposited his own check. The whole Court, however, thought that this distinction was immaterial. The only practical difference would be in the amount of security on the paper, but this was not considered important enough to warrant a qualification of the rule. On the other hand, the fact that the check was entered as cash in the depositor's pass-book and that the plaintiff had all the rights of an ordinary depositor were deemed sufficient to warrant the application of the presumption, notwithstanding the other facts.

In only one of the cases here cited were the facts approximately similar to those in this case.[13] There the depositor sold a bill of lading, with a draft attached, drawn by him on the consignee, to a bank and was credited for the amount in his account. But, unfortunately the case was dismissed without discussion, the effect of the decision being that a debt was created instantly. There seems to be no substantial reason for altering the rule because of this difference; the depositor is liable on the check in either event, as an indorser or as a maker. This change places no additional burden upon the bank. While it is true that where the check is of the depositor's making, there will be no indorsement to help determine the character of the transaction, nevertheless, this would only be another reason for leaving the consideration of the agreement to the jury guided by the presumption that ordinarily prevails. Other jurisdictions which have not been so unhesitating in applying this presumption might balk at a case of this character, but the above decision would seem to be nothing more than a logical outcome of the New York rule.

J. S. B.

CONFLICT OF LAWS—TAXATION—INHERITANCE TAX—It is uniformly held, either from express words in the statutes or by judicial construction, that an inheritance tax is payable with respect to all realty within the jurisdiction without regard to the domicile of the late owner,[1] but with respect to no realty outside the jurisdiction even when the owner was a resident of the State laying the tax.[2] This, it is submitted, is clearly the correct con-

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[13] Fourth National Bank v. Mayer (*supra*).

[1] Callahan v. Woodbridge, 171 Mass. 595 (1898,) applying Ch. 15, §1, of Revised Laws of Massachusetts—"All property *within the jurisdiction* of the Commonwealth, corporeal or incorporeal, and any interest therein, whether belonging to inhabitants of the Commonwealth or not, which shall pass by will . . . . shall be subject to a tax of five per cent. of its value, for the use of the Commonwealth."

[2] The Collateral Inheritance Tax of Pennsylvania, Act of May 6, 1887, P. L. 79, reads as follows: "All estates, *real or personal*, of every kind whatsoever, situated within this State, whether the person or persons dying seized thereof be domiciled within or without the State, and *all other such estates situated in another State* . . . . when the person or persons dying seized thereof shall have their residence within this Commonwealth . . . . . shall be subjected to a tax . . . ." The Supreme Court in Bittinger's Est., 129 Pa. 338 (1889), held that this act could only subject realty within the State to taxation notwithstanding the wording "all such estates situated in another State." The Court said that the legislature had exceeded its power in attempting to fix such liability on realty beyond its jurisdiction.